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MICHAEL BODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO 72-1685

BEN OWEN,
Petitioner,

v.

ANGELINE BARBARA OWEN,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

MAX D. McCULLOUGH
15 South Gratiot Avenue
Mt. Clemens, Michigan 48043
Phone: (313) 463-0597
Counsel for Petitioner

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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Petitioner respectfully requests that this Court grant rehearing of its order dated October 9, 1973, which denied certiorari, and that the Court now grant certiorari.

The Petition for certiorari previously filed herein presented the questions:

(1) Whether the action of the Michigan Supreme Court in (a) holding that a sister state *ex-parte* judgment of di-

vorce does not terminate a Michigan separate maintenance order, and (b) also holding that a Michigan *ex-parte* Judgment of Divorce terminates a foreign separate maintenance Judgment, is a denial of full faith and credit as required by U.S. Constitution, Article 4, Section 1.

(2) Whether the Michigan Supreme Court Opinions, which constitute State action, which declare that a Michigan *Ex-Parte* Judgment of Divorce terminates a sister state support order, whereas a sister state *ex-parte* Judgment of divorce does not terminate a Michigan separate maintenance order, is a denial of equal protection of the law, U. S. Constitution, Fourteenth Amendment, Section I, in that it grants relief requested by the Petitioner to residents of the State of Michigan but denies the same relief to non-residents who are subject to the Court's Jurisdiction?

As grounds for this Motion, Petitioner states the following:

Michigan law is clear that Separate Maintenance support does not survive Absolute Decree of Divorce.

While it was held in *Estin* v *Estin,* 334 U.S. 541, 68 S. Ct. 1213 (1943), that a state may determine whether or not a domestic separate maintenance decree shall survive a sister state divorce decree, it was also stated that said state must have such a policy to stand as its determination. It may not arbitrarily change such and discriminate against out-of-state *ex-parte* divorces.

Prior to January, 1972, the law of Michigan was such that if a wife prayed for Separate Maintenance and husband sought by a cross-bill an absolute decree of divorce, but failed to establish his right to such, wife would obtain separate maintenance but could not be forced to accept a decree of absolute divorce. MCLA 552.301; *Johnson* v *Johnson,* 22 N.W. 2d 751, 314 Mich. 376 (1946); *Kelly* v. *Kelly,* 233 N.W. 2d 170, 252 Mich. 92 (1930).

The Legislature, in 1971, repealed MCLA 552.301, and amended the law of separate maintenance, and the state policy, by amending with an effective date of January, 1972, MCLA 552.7, which reads:

(1) An action for separate maintenance may be filed in the circuit court in the same manner and on the same grounds as an action for divorce. In the complaint the plaintiff shall make no other explanation of the grounds for separate maintenance than by use of the statutory language.

(2) The defendant, by answer, may either admit the grounds for separate maintenance alleged or deny them without further explanation. An admission by the defendant of the grounds for separate maintenance may be considered by the court but is not binding on the court's determination. The defendant may also file a counterclaim for divorce.

(3) If the defendant files a counterclaim for divorce, the allegation contained in the plaintiff's complaint as to the grounds for separate maintenance may be considered by the court but is not binding on the court's determination.

(4) If evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved, the court shall enter:

(a) A judgment of separate maintenance if a counterclaim for divorce has not been filed.

(b) A judgment dissolving the bonds of matrimony if a counterclaim for divorce has been filed.

MCLA 552.7 clearly dictates at 4 (a) and (b) that if plaintiff files an action for separate maintenance and defendant counterclaims for divorce, the court, upon sufficient evidence, *shall* enter a Judgment dissolving the marriage.

This revision of the Separate Maintenance Law of the State of Michigan has, in effect, clarified the Michigan stance on whether or not its Separate Maintenance Decree shall survive a sister state's *ex parte* decree of divorce. A defendant may now, under MCLA 552.7, compel the court, by counterclaiming for divorce, to dissolve the bonds of matrimony if it grants any relief at all. Since this now be the case, it must also follow, of necessity, that an *ex-parte* divorce from a sister state would have the same effect as a counterclaim for divorce in the Michigan Courts, to-wit: To terminate separate maintenance.

If such were not the case the rule of *Estin, supra,* would be violated. Prior to 1971, the Legislature of the State of Michigan allowed the Courts, regardless of a counterclaim by defendant for divorce to grant separate maintenance, and further, to determine whether it should survive an ex-parte divorce decree of a sister state. The Michigan Courts no longer have this prerogative in that a defendant may now simply counterclaim for divorce and effectively prevent any separate maintenance orders. For a Michigan court now to refuse to recognize that a sister state *ex-parte* divorce would have the same effect as an absolute decree of divorce granted by the Michigan Court under MCLA 552.7, would be wholly arbitrary and unacceptably discriminatory.

As Petitioner's earlier Petition for Certiorari pointed out, Michigan's policy has at best been one of inconsistency. The statutory law of Michigan is now clear that either party may at any time wholly avoid separate main-

tenance. The courts no longer have discretion to enter judgment for separate maintenance or divorce. It follows that if a defendant may totally avoid a separate maintenance obligation after divorce by obtaining such divorce in Michigan, it would be blatant discrimination for the Michigan courts to hold that a sister state *ex-parte* divorce decree would have any less force and effect.

Since the holding of the Michigan Court in the instant case is directly in conflict with the law of Michigan in regard to its own residents, it clearly contravenes the law as set down by *Estin, supra,* and is wholly and totally violative of the Constitution of the United States, Article Four, Section 1 and the Constitution of the United States, Fourteenth Amendment, Section 1. Therefore, compelling reasons are evident why the question presented should be reviewed and definitively determined by this Court.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

MAX D. McCULLOUGH
Attorney for Petitioner.
15 South Gratiot Avenue
Mt. Clemens, Michigan 48043

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2, of Rule 58.

Max D. McCullough

Oct 31, 1973